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**Who's Afraid of Sunlight?  
Explaining Opposition to Transparency  
in Economic Development**

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# Who's Afraid of Sunlight? Explaining Opposition to Transparency in Economic Development

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## Abstract:

Why do some firms oppose transparency of government programs? In this paper we explore legal challenges to public records requests for deal-specific, company-specific participation in a state economic development incentive program. By examining applications for participation in a major state economic program, the Texas Enterprise Fund, we find that a company is more likely to challenge a formal public records request if it has renegotiated the terms of the award to reduce its job-creation obligations. We interpret this as companies challenging transparency when they have avoided being penalized for non-compliance by engaging in non-public renegotiations. These results provide evidence regarding those conditions that prompt firms to challenge transparency and illustrate some of the limitations of safeguards such as clawbacks (or incentive-recapture provisions) when such reforms aren't coupled with robust transparency mechanisms.

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## Introduction

Government transparency is seen as both improving public policy as well as public trust in government. Revelations enabled by open records laws have prompted numerous calls for government reforms at the international and domestic level (Mizrahi and Vigoda-Gadot. 2009, Kim and Lee 2012). In the United States, the lack of transparency in economic development activities of states and cities, such as the use of targeted tax incentives to encourage business investment, has been heavily criticized by scholars and activists (Jensen and Malesky 2018). Recent efforts by activist NGOs as well as governments have led to an increase in the transparency of many economic development programs.<sup>1</sup> Yet little is known regarding the effects of transparency reforms of economic development programs.

In this project we take a novel approach to this question by examining the transparency behavior of corporate beneficiaries of an economic development program. Specifically, we examine firms' responses to public records requests for information on their economic development incentive deals that they received from a state economic development program. We argue that by understanding firm preferences for or against transparency, we can begin to understand the implications of this transparency revolution for policymaking as well as the types of activities that firms are attempting to shield from public scrutiny.

Specific to our paper, we examine firm opposition to public records requests of a State of Texas discretionary economic development program, the Texas Enterprise Fund (TEF). This program selectively awards cash grants to companies relocating or expanding operations in Texas in

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<sup>1</sup> For example, NGO Good Jobs First began "grading" states on deal-specific transparency in 2007. It found then only 23 states with even one program disclosed online. By 2015, it found that all 50 states and the District of Columbia were disclosing online. In 2008, Good Jobs First began aggregating this state data, along with federal and local-government records, in its Subsidy Tracker, an online database.

exchange for job creation. TEF includes clawback or recapture provisions that allow the state to enforce incentive agreements by delaying payment, canceling contracts or even forcing repayment of past grants with interest. We made public records requests for TEF deals and then documented which firms challenged our requests by attempting to withhold or redact parts of their state files.

Our records request, specifically for company-specific applications and contracts, was submitted to the Texas Office of the Governor and then the subject companies were notified and given the opportunity to challenge our request. We examined these firm challenges to examine why each respective firm challenged our request and what types of information they were attempting to withhold from us. In total, 45 out of 164 firms challenged our public records request.

Companies were partially successful in limiting our public records requests, but we were still able to acquire two valuable sets of documents from the State of Texas. First, the State of Texas released to us a list of all companies that have amended their Texas Enterprise Fund contracts. These amendment documents are not public and to our knowledge haven't been reported by the media or announced by the state. Second, the state is complying with our public records requests by releasing batches of partially redacted amendments and applications in waves. To date we have received applications, agreements and any amendments from 63 of the 164 companies. These materials varying the level of unredacted details, but in all cases we have been able to document how the amendments differ from the original incentive agreement.

What explains firm legal challenges to our public records request? We focus on two potential explanations –firms that have been subject to formal clawback penalties because for non-compliance, and firms that have renegotiated their incentive contracts to avoid suffering clawbacks.

The State of Texas monitors the performance of Texas Enterprise Fund, and has imposed public clawbacks, or grant recapture, for many companies that participated in the program. These formal contract provisions enforce the agreed-upon job creation and wage levels. The State may

also rescind awards for defaulting, along with additional financial penalties. Information detailing such penalties is public, posted directly on the government website in an accessible table format.

What isn't public is that a large number of companies have renegotiated their TEF agreements, usually committing to fewer jobs created, or their hiring schedule, or how headcount should be computed (with some renegotiated deals allowing firms to count employees in subsidiaries that weren't party to original TEF-subsidized project). In many cases, such contract amendments are made right before a company would otherwise be subject to clawback provisions. For example, in one case an incentive agreement was changed to reduce the number of jobs required one day before an employment deadline.

Statistical analysis of which companies challenged our public records request suggests that factors such as the size of the incentive or the number of jobs proposed have little predictive power in explaining the challenges. To our surprise, we find that companies that had been subject to clawbacks or recapture in the past were less likely to challenge our request. Conversely, companies that had negotiated amendments to their TEF agreements were much more likely to seek to keep their files undisclosed.

These results suggest to us that the firms that have already been subject to publicly-disclosed clawbacks for failing to fulfill the conditions of their agreements had little incentive to block investigations into their applications and agreements. It was those companies that had made amendments to their agreements, which to our knowledge had never been made public, that challenged our public records request.

In the final section of the paper we examine a sample of these applications and find a clear pattern regarding amendments. First, a large share of these companies amended their applications to lower their job-creation requirements and thus ease compliance with the conditions of the grant. Our analysis doesn't include any verified external data on the companies' actual jobs, but this pattern

is consistent with companies renegotiating their incentive contracts, often also agreeing to smaller grant awards, in order to avoid clawbacks. We also found other kinds of application changes, such as how jobs are defined, and how much of a penalty a company will be obligated to pay in the event of non-compliance with the award.

Our results also speak to academic literature on the implications of transparency for firms. Although our study focuses on a single incentive program, the firms involved in this study are large, often multinational firms with the ability to locate across the country. Our study suggests that although some firms renegotiated their contracts to limit the costs of the a clawback, many of these amendments are targeted at avoiding a publicly-disclosed clawback, even if that means accepting a smaller incentive award. This suggests that the public stigma of being identified as being non-complaint with an incentive award is a motivating factor in renegotiation as well as the motivation for challenging the transparency measures. We suspect that these preferences for avoiding public non-compliance with awards is generalizable across states.

Our results are troubling for what has been seen as best practices in economic development. Clawback provisions and transparency are considered fundamental safeguards for assuring that taxpayers are protected and that companies are held to standards in terms of job creation and wages, although there is considerable variation in the implementation of these standards.<sup>2</sup> As noted by Mattera et al (2012) in their landmark study of clawback provisions, many states fail to publicly disclose clawback events and many states fail to properly enforce facially sound provisions. Our results suggest an additional concern. Companies can not only avoid clawbacks through private renegotiations, they can also use open records appeals to limit the transparency of these programs.

## **Literature review**

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<sup>2</sup> See LeRoy (1997) for one the first collection of clawback provisions in the United States.

Although the empirical evidence has been mixed, increasing the transparency of the policy process has been heralded as one of the keys to reducing government malfeasance and corruption (Rose-Ackerman 1999<sup>3</sup>). Studies of corruption have found that increasing transparency can either decrease (Islam 2006) or increase (Escaleras et al 2010, Costa 2013) perceived corruption. Cordis and Warren (2014) argue that transparency can deter corruption, by uncovering it, which can have opposing effects on the perception of corruption. Using actual corruption conviction data, Cordis and Warren find that strong freedom of information act (FOIA) laws in the United States increase the likelihood that corruption will be deterred, uncovered, and/or prosecuted.

There also exists evidence that the creation of transparency laws is shaped by the political environment. Wehner and de Renzio (2013) find that democratic states are more likely to have strong fiscal transparency infrastructures, and that the effect is greatest in the presence of high levels of partisan competition. In the US context, Berliner (2014) shows that states enact strong FOIA laws where there is political uncertainty over who will control the government in the future. These laws provide transparent institutions that seem to be more effective in providing information than informal requests from government agencies.<sup>4</sup>

Bureaucracies may also selectively provide information based on the attributes of the requestor, including partisanship (Porter and Rogowski 2018) and gender (Rodríguez and Rossel 2018). Other studies find that the political context, such as the polarization of politics (Wood and Lewis 2017) or the perceived behavior of other government agencies towards FOIA requests (ben-Aaron et al 2017) all impact responses.

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<sup>3</sup> Another literature studies the impact of fiscal transparency rules on government performance. See Alt et al (2002) and Alt et al (2006) for examples.

<sup>4</sup> See Worthy et al (2017) for experimental evidence from England.

Many of these studies examine how variation in bureaucracies or requests affect responses. Little is known about how third parties, specifically corporations, respond to these public record acts. Management scholarship has examined voluntary disclosure in areas such as political spending (Goh et al 2018) and financial reporting (Leuz and Wysocki 2016), but it lacks work focusing on firm responses to disclosure laws. Jensen and Malesky (2018) find that numerous industry associations as well as state economic developers formally protested new rules to improve the transparency of tax incentives. In this study, we explore the different firms' responses to these requests.

Academics have long been critical of these programs, arguing that the majority of economic development incentives provided in the form of cash grants, property tax abatements, or income tax credits are particularly ineffective (Busse 2001). A recent meta-analysis of 34 studies by Bartik (2018) finds that the majority of incentives are offered to firms that already have plans to relocate or expand in a given location. The studies' findings range from only 2% to 25% of incentives tipping investment decisions to a location, with the remaining 98% to 75% of firms maintaining preexisting plans.

Nationally, economic development incentive programs have come under fire across a number of states, including the state of Texas. The specific program that we are exploring, the Texas Enterprise Fund, has been the subject of numerous controversies<sup>5</sup>, sparking a heated debate in a recent legislative session over whether to defund the program.<sup>6</sup>

### **Public Information Requests and the Texas Enterprise Fund**

Texas has a number of economic development programs, but none are as high profile as the Texas Enterprise Fund. This “deal closing fund” was created in 2003 to target firms considering

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<sup>5</sup> McGaughy (2014).

<sup>6</sup> Walters (2017).



either Texas or other out of state investment locations. According the Office of the Governor (2017, 3), “The fund is used only as a final incentive tool where a single Texas community is competing with another viable out-of-state option.” That is, the awards are made on a discretionary basis; they are not “as of right,” or automatic based on a company performing an eligible activity. TEF awards can be made only by a unanimous vote of the Governor, Lt. Governor, and Speaker of the House of Representatives.

With an original allocation of \$295 million dollars, this fund was and is the largest deal-closing fund in the United States. As of 2017, just over \$600 million in grants had been awarded to 146 projects guaranteeing 83,000 jobs.<sup>7</sup> A wide range of firms have received TEF grants, and in some cases multiple awards. Recipients include Apple (\$21 million), Cabela’s (\$400,000), Caterpillar (\$1.1 million and \$8.5 million), Chevron (\$3 million), Citgo (\$5 million), Dow Chemical (\$1 million, \$1.5 million), Facebook (\$1.4 million), Kohl’s (\$750,000), LegalZoom (\$1 million), Lockheed Martin (\$4 million), Merck (\$6 million), Samsung (\$10.8 million) Sematech (\$40 million), SpaceX (\$400,000), Texas Instruments (\$50 million), Toyota (two awards of \$40 million each), and Visa (\$7.9 million). These Texas Enterprise Fund awards were often accompanied by local incentives<sup>8</sup> and potentially other state incentives.

The Texas Enterprise Fund hasn’t been without controversy. A scathing audit of the program in 2014 uncovered numerous weaknesses, including companies being awarded grants without filling out formal applications, companies having no job creation obligations for awards, as well as poor oversight and monitoring (State Auditor 2014). Numerous news outlets ran stories on

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<sup>7</sup> [https://gov.texas.gov/uploads/files/business/TEF\\_Listing\\_10-11-18.pdf](https://gov.texas.gov/uploads/files/business/TEF_Listing_10-11-18.pdf)

<sup>8</sup> Typically the Texas Enterprise Fund matches, and exceeds local incentives offers. In some cases firms withdraw from the local incentives programs and continue in the Texas Enterprise Fund program.

the program and high-profile politicians including the House Speaker Joe Straus, have criticized the program.<sup>9</sup>

In an unrelated case, after this audit, the Supreme Court of Texas issued a ruling that was criticized by transparency experts in the state. In *Boeing vs. Paxton*, the Court ruled that records, if disclosed, which would put governments or companies at a competitive disadvantage could legally be withheld. The Boeing ruling has been invoked by numerous firms and government agencies, most famously by the city of McAllen, Texas to shield the details of its contract, including the fee, for an Enrique Iglesias concert.<sup>10</sup> In the context of our study, the Boeing ruling provides a legal avenue for firms receiving economic development incentives to challenge public records requests seeking information on their applications or contracts. As a result, affected parties—including government actors, consultants and the firms receiving awards— are given ten days from notification by Office of the Governor to formally challenge the public information request.

## **Research Design and Methods**

Our original research project began as a study of economic development in Texas, issuing public records requests for all application materials as well as contracts for the Texas Enterprise Fund (TEF). Given that our original inquiry was not about transparency, our here research is not experimental, nor did we have clear theoretical expectations prior to data collection. Thus, our research design is observational and exploratory, yielding insights into the workings of this program as well as theory regarding firm behavior around transparency.

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<sup>9</sup> Poppe (2018).

<sup>10</sup> See Collins (2018) for an excellent overview.

Our public records request was submitted on November 28, 2017 which included all applications as well as the formal contracts for every applicant to the program since inception.<sup>11</sup> Application materials includes a formal application, two years of financial statements, as well as other materials. Contracts include the formal contract between the state and the company as well as any amendments.

Third parties were given ten days to respond to this request, presenting legal challenges and the Office of the Attorney General issued a letter on March 28, 2018 summarizing their comments. A total of 45 third parties legally challenged our request including 44 companies receiving TEF awards.<sup>12</sup>

Many of these companies cited the Boeing ruling in their complaints. In the Office of Attorney General's summary (March 28, 2018, 3): "ADP, Allstate, Apple, BASF, Charles Schwab, Chevron, CITGO, Comerica, Cordish, Ebay, E&Y, Fred's, Fritz, GM, GSF, Hulu, Reuters, USAA, and Westlake Chemical each state they have competitors and release of their information at issue would give their competitors an advantage." Some of these firms, along with others, also used arguments on trade secrets to shield parts of the application, including CED, Corrigan, Cordish, Dow, HMS, Kubota, Lockheed-Martin, Riseever, Toyota and Visa. Many of these same firms, including Apple, Cordish, Fred's, GATX, GGNCS, Payless and Riseever also raised legal exceptions for economic development activities through section 552.131 of the Government Code. In addition to these challenges, firms included other additional challenges, such as USBC's claim that notes in the margins of the application constitute attorney-client privilege.

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<sup>11</sup> The Office of the Governor generated a cost estimate of \$1,207.60 which was deposited on Dec 19 2017.

<sup>12</sup> One consulting company involved in economic development impact analysis for applications also responded.

We are careful in our interpretation of these challenges given that many of these legal challenges were both broad and initiated by hired legal council. For example, Apple's public records challenge, from law firm DLA Piper, was one of the broadest in the group, challenging almost every aspect of the application, including the already public information in the document, using numerous cases as well as exceptions for economic development. It is unclear if this especially aggressive legal challenge was at the direction of the company, the firm, or a particularly ambitious associate at the firm. We simply assume that the challenge, and not the specific details, are done at the request of the company.

As we note below, these legal challenges were partially successful; a number of the application and contract documents that we received through our public records request included redacted sections. Despite these partially successful legal challenges, this public records request yielded three pieces of data that we discuss in more detail. First, the State of Texas provided a complete list of all companies participating in the programs and which companies have amended contracts to their agreements. This list doesn't provide details on the content of the amendments, but it allows us to determine which companies made changes to original agreements. Second, the Office of the Governor is releasing redacted application and agreements in waves, and to date we have received these materials for 63 companies. This release of this data is ongoing and we plan to update this paper with additional cases as they are made available. Despite the redactions, for 29 of these companies we can document the changes from the original agreement to the amended agreements. Third, we have the complete list of companies that challenged our public records request. Thus, we have a data set that includes all company participants in the program, which companies challenged our public records request, and for 63 companies the contents of their applications, agreements and any amendments.

For our purposes, we do not focus on the legal arguments made by the third parties in their challenges, although our robust tests and empirical analysis do allow us to exclude certain types of legal challenges. Our main dependent variable for our project is whether a third party challenged our public records requests. Focusing only on the projects that have received funding (not new applicants that have yet to receive a first disbursement), we assigned an independent X variable denoting the total awards, and a dependent Y variable signifying the total legal challenges to our request (See Appendix A).

We examine two main explanatory causes. First, the Fund has a formal process of allocating incentives after certain job-related benchmarks are met as well as clawback provisions where firms that are found to be non-compliant with the terms of their incentive award are punished. These clawbacks have become best practice in economic development (Ledebur and Woodward 1990) although there are concerns about the willingness of politicians to enforce these sanctions and doubts as to whether such measures actually improve the performance of these programs (Weber 2002, Mattera et al 2012, Jensen 2017).

Since clawback events are publicly disclosed on the TEF program website, we are able to code firms that paid a clawback or a similar repayment with a 1, and 0 for those with no repayments. A total of 61 firms in our data set paid clawbacks in the period of 2003 to 2017. We code *Clawback Dummy* as 1 for any firms that had paid a formal clawback at the time of our public records request (November 2017).

Our second explanation pertains to what we believe is the first discovery of amended contracts in TEF data. Numerous project agreements were amended after the initial award, in many cases lowering the number of jobs necessary to fulfill the TEF obligations, changing the definition of a job (sometimes even allowing project headcount to include subsidiaries that weren't included in the original application), or changing the job-creation schedule in its entirety. In most cases, these

changes lead to both fewer jobs and smaller TEF grants. To our knowledge, these amended agreements have heretofore not been public documents.

Our study codes amendments in two ways. First, we requested a list of all companies that received amendments as a follow up to our public records request.<sup>13</sup> We proceeded to Code *Amended Contract* as 1 for all such companies.

After receiving this list from the Governor's office, we checked this list against a sample of contracts and did notice a small number of discrepancies between the Governor's office list and our own documented amendments. We realized that some contracts may have been amended before their projects began, such as a contract with SpaceX, and thus were not listed as having been amended on the Governor's list. Thus, as a second coding, we simply coded all firms that had undisbursed funds at the time of our public records request with a 1. The correlation between these two measures is 0.82.

Following the advice of Lenz and Sahn (2018), we utilized probit models with no control variables denoting the firm's legal challenge as the dependent variable. We present four probit models in Table 2; the coefficient estimates are marginal effects at the mean (MEMs). Our first model includes only our *Clawback Dummy* and dummy for an *Amended Contract*. Across all four models we find a consistent sign and size of the coefficient on clawbacks, although the variable becomes statistically insignificant when we include a control variable for the size of the investment.

To our surprise, we find that firms that have been subject to clawbacks were 12-15% less likely to have challenged our public records request. One interpretation of this result is that these

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<sup>13</sup> The office of the Governor has been releasing batches of contracts to us through this public record process. After receiving numerous amended contracts we submitted a follow-up request for a list of all amended contracts. The Office of the Governor provided us with this list. Thus we have the full list of amended contracts, but as of writing this paper, we do not have the content of all of the amended contracts.

companies have already been revealed publicly as not complying with the agreement and faced a financial penalty, hence have no incentive to shield their contracts from public records request.

Our main finding is that amended contracts, regardless of the amendment process, have a significant impact on whether firms challenged our public records requests. Firms that have amended their contracts are between 15% and 24% more likely to have challenged our public records request. Our results are consistent to additional robustness test including dummy variables in Models 5 and 6.

**TABLE 2: Modeling Public Record Challenges**

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Clawback Dummy	-0.152** (0.08)	-0.156** (0.08)	-0.121 (0.08)	-0.135* (0.08)	-0.143* (0.08)	-0.148* (0.08)
Amended Contract	0.178** (0.09)		0.158* (0.09)		0.225** (0.10)	
Amendment Proxy		0.244*** (0.08)		0.224*** (0.08)		0.264*** (0.08)
Award Size (ln)			0.0397 (0.03)	0.0271 (0.02)	0.0226 (0.03)	0.0107 (0.02)
Industry Dummies	No	No	No	No	Yes	Yes
N	125	125	125	125	122	122
Pseudo R2	0.05	0.10	0.07	0.10	0.13	0.16
chi2	6.31	10.14	8.64	10.92	17.81	21.14

*Note:* Probit models presented as marginal effects. Firm legal challenges as the dependent variable. Robust standard errors in parentheses. \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Our results provide suggestive evidence that firms that have amended their incentive contracts are more likely to challenge public records request for information on their projects. Given the small sample size and the exploratory nature of our analysis, we are careful in our interpretations of these results. But this is consistent with firms blocking records requests to hide details of amended contracts.

Another important limitation of our work is that we do not know what is in these all of these amendments, and hence whether there is a causal relationship between potentially embarrassing information and a firm's legal challenges. We turn to this question in the next section.

### **Case Studies: Company Amended Contracts**

Our empirical results provide suggestive evidence that the firms that challenged our public records request are likely to have renegotiated their incentive contracts to avoid formal (public) sanctions. Our analysis cannot definitively prove that these firms have renegotiated their contracts, since some firms were successful in having their contracts redacted and many of these contracts are still being reviewed by the Texas Attorney General for potential release.

In this section we explore the contracts we do have access to as of November 2018. As noted, our initial public records requests began on November 28, 2017 and we are receiving waves of thousands of pages of documents. As of November 28, 2018 we have received a total of 63 contracts. We use this set of contracts to qualitatively analyze any contract amendments.

In our sample of 63 contracts, 24 of the contracts were subject to third-party challenges. Almost half (29) of these contracts had at least one amendment. As we noted in the previous section, these amendments were a strong predictor of legal challenges against transparency (10 of the 29 companies with amended contracts challenged our request).



**Figure 1: TEF agreement amendments, by type**

Amendment Type	Count	Firms
Technical	7	Hanger, Cerealto Seguin, Dow Chemical (2012 Grant), Dow Chemical (2013 Grant), HelioVolt Corp., Grifols, Flexsteel Pipeline Technologies
Job Target	8	Ferris Manufacturing, KLN Steel Products, Lockheed Martin, SpaceX, Grifols, GE Transportation, Huntsman, Fidelity
Job Schedule	9	Continental Automotive, Martifer-Hirschfield Energy, athenahealth, Authentix, Forum Production, Zah Group, KLN Steel Products, Huntsman, Fidelity
Expand Position Def.	14	Caterpillar, Comerica, Allstate Insurance, Hanger, Golden Living, Consolidated Electrical Distributors, CGI Technologies, Health Management Systems, Zah Group, Charles Schwab & Co., Forcepoint, Flexsteel, GE Transportation, Fidelity

These amendments to TEF agreements are significant for two primary reasons. First, in the vast majority of cases the terms of the amendment are favorable to the firm. The four primary types of amendment are: technical changes, which cover issues unrelated to contract performance (change in firm name, etc); changes in job-creation schedule, meaning an extension to the deadline upon which a firm is required to have fulfilled its job target; changes to a job target, meaning a reduction in the total number of jobs the firm is required to create; and broadening of the contractual definition of a “created position,” which typically means that firm becomes able to include employees at non-project subsidiaries and affiliates towards its job target.<sup>14</sup> The significance of the first reason is magnified by the second: TEF agreement amendments are private documents. Unlike clawbacks (which are made public), amendments allow firms to quietly dial back their commitments while avoiding potential public scrutiny. For TEF-recipient firms, signing such an amendment is doubly preferable to paying a clawback: they are able to alter the terms of the deal such that they can avoid violating them (and thus paying clawback fees), and they are able to do so privately.

<sup>14</sup> Some firms combine multiple amendment types into one amendment document; for example, Zah Group amended its 2010 agreement to both delay their job schedule by one year and to allow positions created with its affiliate (Klein Tools) to count towards its job target. For this reason, the count column in Figure 1 does not sum to the number of total amendments (29).

We present our 29 cases of amendments in Figure 1. Of the four primary amendment types, technical change amendments result in the least substantive alternation to the original contract. For example, in 2016 food manufacturer Cerealto amended its 2014 agreement contract to reflect its name change from Siro Group USA to Cerealto Group USA. This simply changes the name on the contracts but doesn't result in any other substantive changes.

A more complex example of technical changes is Dow Chemical's two amended contracts in 2015 that changed its job threshold (the number of pre-agreement employment positions that the firm maintains in Texas) to reflect the firm's decision to transfer a number of its employees to a non-Dow company. Changing the job threshold does not change the job target, job schedule, or definition of a created employment position. The Cerealto change should have no impact on their ability to fulfil their TEF requests, while the Dow Chemical revisions are more open to interpretation upon the firm's own motivation and TEF requirements effects on their books. It is important to note that Cerealto did not challenge our public records request while Dow did.

Of the 29 amendment documents that we have received so far, the most common is the expansion of the contractual definition of a created job. These amendments allow firms to utilize their subsidiaries and affiliates towards their total job target, effectively treating indirect job creation (for example, new positions created by an affiliated transportation company as a result of increased output from the new production facility) as equivalent to direct job creation (workers hired for the specific purpose of operating the facility for which the firm received the TEF grant) for their development project.

As an example, in 2007 Comerica received a \$3.5 Million TEF grant to relocate their corporate headquarters to Dallas in order to create 200 jobs . In 2012, Comerica negotiated an amendment to its original agreement that expanded the range of jobs that could be counted towards its original job creation target. First, the amendment allowed jobs created with subsidiaries Comerica

Bank and Comerica Management Company to count towards its job target. Second, the amendment allowed Comerica to count fifteen of its executive officers (including the CEO) as newly created jobs provided that they relocated to Dallas or Houston. An added benefit – executive officers would clearly have an impact on the average wages of the new employees, making it easier to meet wage requirements. Similarly, Allstate amended its 2010 agreement contract to allow new positions created with Esurance, a direct personal insurance provider that Allstate acquired in 2013, to count towards its job target. Both Comerica and Allstate challenged our public records request.

The third major amendment type involves changes to the job schedule. This allows firms to alter their yearly job targets without changing the final target or deadline. For example, Martifer-Hirschfield Energy's 2009 amendment to its 2008 agreement, pushes back its job target of 10 new jobs to April 2009. The Martifer-Hirschfield amendment is notable because it was signed on January 31<sup>st</sup>, 2009, the same day that its first annual compliance verification (a report on the number and type of newly created positions) was due. Martifer-Hirschfield Energy's project has been the topic of considerable controversy and the firm eventually repaid all of the award plus interest for non-performance.<sup>15</sup> Unsurprisingly, we did not receive a public records challenge for this newly canceled contract.

Companies can also make more substantive changes to the job creation promises. This change in the job schedule also allows firms to extend the job creation deadline, retaining the same yearly targets but shifting them down the line. Continental Automotive's 2013 amendment to its 2012 agreement, for example, leaves the original annual job targets unchanged but shifts each of them two years into the future, changing the job creation deadline from December 2016 to December 2018. Job schedule amendments thus allow firms to fine-tune their plans for job creation

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<sup>15</sup> Hyde (2015).

(as in the case of Martifer-Hirschfield) or make larger changes to the project completion date (as in the case of Continental) without paying clawbacks. Continental Automotive did not challenge our public records request and in July 2018 they received their full \$1.2 million incentive award.

The final TEF amendment category involves reductions of the job target, the total number of jobs that the firm has committed to create. Though these amendments can be combined with changes to the job schedule, they need not be - of the four job target amendment documents that we've received to date, only one also contains an extension to the job creation deadline. These amendments arguably result in the largest changes to the original agreement, as they constitute quantitative reductions in the deliverables that the firm is required to produce. However, the changes are not one-sided; amendments to the total job creation requirement are paired with amendments to the size of the TEF grant. For example, in 2008 Lockheed Martin amended its 2007 agreement to reduce its job target from 800 to 550 new employment positions, a reduction of 31%. The amendment also reduced the size of the grant from \$5.48M to \$4M, a reduction of nearly equal scope (~30%). However, reductions in the grant amount are not always directly proportional to the size of the job target reductions. Ferris Manufacturing (now PolyMem), a healthcare products manufacturer, amended its original agreement to reduce its job target from 100 to 80 (20%); the amendment came along with a reduction of the grant from \$450,000 to \$420,000 (only 6.6%). Both Lockheed Martin and Ferris Manufacturing, along with amending their contracts, paid formal clawbacks to the state of Texas. Only Lockheed Martin challenged our public records request.

In summary, these amendments suggest that firms have been able to renegotiate their TEF agreements in ways that are consistent with avoiding clawbacks. We cannot show that avoiding clawbacks was the motivation for these amendments, but in most cases these amendments lower firm performance standards in a manner consistent with clawback avoidance. Although there are other factors that contribute (competitive industry landscape, etc.) towards challenges to our

requests, we show that numerous firms that renegotiated their contracts also formally challenged our request.

What we can't differentiate in this case is if these firms challenged transparency to avoid the financial penalties associated with clawbacks or if they were attempting to avoid the public scrutiny that comes with failure to comply with a TEF agreement.

Our conjecture is that the public scrutiny is a more powerful motivator since we see cases of firms willingly forgoing some of their TEF benefits in order to renegotiate their contract. Although we cannot rule out the fact that some of these firms, when they are in non-compliance with their TEF agreements could be in non-compliance with other local incentives agreements.

## **Conclusion**

In this project we harness firm legal challenges to public records requests as data. Our project examines firm performance in conjunction with receiving incentives from the flagship Texas economic development fund, Texas Enterprise Fund (TEF). The program provides cash grants to firms in exchange for meeting job metrics that include both the quantity of jobs and the average wages of these jobs.

In our request for the original applications and the formal agreements, 45 out of 165 firms used an economic development exception in Texas public records laws to formally challenge our request. In our statistical analysis we show that the firms that were most likely to challenge our requests were firms that amended their contracts in methods that are consistent with lowering standards to avoid formal non-compliance with the program.

Our select case studies illustrate the variety of types of amendments, but the most common amendment lessened the burdens for job creation through changing the number of jobs required, allowing firms to include employees not originally part of the agreement, or lengthening the amount of time companies have to create promised jobs.

We believe this paper has two important implications for economic development. First, numerous amended contracts suggests the ineffectiveness of formal clawback mechanisms if they are not coupled with strong transparency provisions. Allowing companies to renegotiate contracts outside of the public eye violates the very spirit of adding performance requirements and performance provisions. Second, we provide evidence consistent with firms using exceptions to public records requests to hide non-compliance with economic development agreements. In short, the firms that are hiding their contracts seem to be doing so for serious reasons.

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### **Appendix A: Third Party Challenges**

According to the Attorney General of Texas letter OR2018-07128 the following third parties challenge the request:

ADP LLC  
Allstate Insurance Company  
Apple  
Arconic Inc f/k/a Aloc Inc  
BASF Corporation  
Charles Schwab and Co. Inc  
Chevron USA Inc  
CITGO Petroleum Corporation  
Comerica Incorporated and Comerica Bank  
Consolidated Electric Distributors Inc  
Cordish Companies and Arlington Live LLC  
Corrigan OSB LLC  
The Dow Chemical Company  
Ebay Inc and Subsidiaries  
Ernest and Young LLC  
Fred's Inc  
Fritz Industries  
GATX Corporation  
General Motors LLC  
GGNSC Holdings LLC  
Golden State Foods Corp  
Health Management System Inc  
Hefei Risever Machine Co. LTD  
Hulu LLC  
Impact Data Source LLC  
Jacob's Engineering Group, Inc  
JSW Steel Inc  
Klein Tools Inc and ZAH Group Inc  
Kubota Tractor Corporation  
Kuraray Americas Inc  
Lockheed Martin  
Louis Vuitton US Manufacturing  
Okidata Americas Inc  
Omnitracs LLC  
Pacific Dental Services LLC  
Payless ShoeSource Inc  
PepsiCo Inc  
Ruiz Food Products Inc

Space Exploration Technologies Corp  
Thompson Reuters Inc  
Toyota Motor North America Inc  
United Services Automobile Association  
United States Bowling Congress  
Westlake Chemical  
Visa